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Supreme Court of the United States.

OCTOBER TERM, 1960.

6333.

STAUFFER CHEMICAL COMPANY,
Petitioner,

v.

BOSTON & MAINE RAILROAD ET AL.,
Respondents.

SAME *v.* SAME.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

SAMUEL P. SEARS,
75 Federal Street,
Boston, Massachusetts,
Counsel for Petitioner.

ADDISON C. GUTCHELL & SON, INC., LAW PRINTERS, BOSTON

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SAME *v.* SAME.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Stauffer Chemical Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled action on November 21, 1960.

Citations to Opinions Below.

The findings of fact, conclusions of law, opinion and judgment of the District Court of Massachusetts (R. 92-97) are unreported and are printed in Appendices B and C attached hereto. The opinion of the Court of Appeals

(R. 103-108) is reported in F. 2d , and is printed in Appendix A attached hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 21, 1960 (R. 109-110). The jurisdiction of this Court is invoked under U.S. Code, Title 28, sec. 1254 (1).

Question Presented.

Whether the Court of Appeals has correctly interpreted the decisions of the Supreme Judicial Court of Massachusetts concerning the law of indemnity in Massachusetts as establishing that indemnification may be allowed in some cases where the indemnitee is negligent but not in other cases where the indemnitee is negligent, in the absence of contractual provisions for indemnification even though the indemnitee is negligent.

Statement.

Respondent Arlene M. Hall's testate, John D. Hall, Jr., was a fireman employed by the respondent Boston & Maine Railroad on October 28, 1958 (R. 15), and on that date was acting as engineer of a train of the respondent railroad on its main line in Woburn, Massachusetts (R. 40). Respondent railroad's train was in collision with a truck on a private grade crossing (R. 45) established for the benefit of petitioner and guarded by gates and a crossing tender provided by petitioner in accordance with an agreement with the respondent railroad (R. 89-91). On the

day in question petitioner's crossing tender opened the gates and permitted the truck to proceed onto the track and into the path of the train (R. 22).

Respondent Hall chose to bring action for the death only against the respondent railroad, alleging a cause of action under the Federal Employers' Liability Act (R. 4-6). The respondent railroad brought a third party complaint against the petitioner under Rule 14 (a), Federal Rules of Civil Procedure, U.S. Code, Title 28, alleging that, if the respondent railroad was liable to the respondent Hall, then the petitioner was liable to the respondent railroad in accordance with the terms of an indemnity agreement contained in the contract under which the private grade crossing was established (R. 9-12). By agreement (R. 14) the third party action was heard by the trial judge at the same time that the action between the respondent Hall, as plaintiff, and the respondent railroad, as defendant, was being heard by the jury. After the general verdict of the jury and jury's answers to special questions (R. 85) were received by the trial judge, he entered findings of fact, conclusions of law and an opinion (R. 92-97), and judgment in favor of the respondent Hall against the respondent railroad, and judgment in favor of the respondent railroad against the petitioner for as much of the judgment in favor of respondent Hall as the respondent railroad could show that it had paid (R. 97).

The indemnity agreement between petitioner and the respondent railroad (R. 91) provides that Stauffer Chemical Company—

> "will indemnify and save harmless [the Boston & Maine] Railroad . . . against any and all loss, cost, damage or expense, and against any and all claims or suits for property damage, personal injury or death, by [Stauffer] Chemical Company

or by any person authorized hereunder to pass and repass thereby or in any way attributable to the failure of [Stauffer] Chemical Company to perform this agreement

or [in any way attributable] to the negligence of any crossing tender in charge of said crossing and in its employ,

or [in any way attributable to the negligence] of any officer, agent or employee of [Stauffer] Chemical Company,

when such claims or suits arise out of or are in any way referable to the existence or use of said crossing."

Petitioner filed an appeal, later amended, from the entry of judgment against it in favor of the respondent railroad and from the denial, by the trial Court, of the motion of the respondent railroad for the direction of a verdict in its favor in the action by respondent Hall against the respondent railroad (R. 99). The Court of Appeals in its opinion (R. 104-108) assumed that Massachusetts law controlled the third party action and went on to construe the contract as requiring indemnification even though respondent railroad was ruled to have been negligent in failing to install automatic devices to warn the crossing tender of the approach of trains.

Reasons for Granting the Writ.

Since petitioner's liability to the respondent railroad depends upon the railroad's liability to the respondent Hall, petitioner adopts and incorporates herein by reference the Reasons for Granting the Writ presented to the Court in the petition for writ of certiorari filed by the Boston & Maine Railroad in the action Boston & Maine Railroad, Petitioner, v. Arlene M. Hall, Respondent.

But, if the petition filed by the Boston & Maine Railroad should be denied, petitioner submits that it is entitled to the granting of its petition since it is of the position and belief that the Court of Appeals has misconstrued the law of Massachusetts and has misapplied it to the indemnity agreement between the petitioner and the respondent railroad.

The Court of Appeals assumes that the law of Massachusetts governs the application of the indemnity agreement, but petitioner submits that the Court of Appeals is bound to follow the law of Massachusetts in this matter. Such is the rule in the following cases: *Dery* v. *Wyer*, 265 F. 2d 804 (2 Cir. 1959); *Kennedy* v. *Pennsylvania R. Co.*, 282 F. 2d 705 (3 Cir. 1960); *Ft. Worth & Denver Ry. Co.* v. *Threadgill*, 228 F. 2d 307 (5 Cir. 1955); *Southwestern Greyhound Lines* v. *Crown Coach*, 178 F. 2d 628 (8 Cir. 1949); *Waylander-Peterson Co.* v. *Great Northern Ry. Co.*, 201 F. 2d 408 (8 Cir. 1953); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902 (9 Cir. 1950); *Chicago, Rock Island & Pacific R. Co.* v. *Dobry Flour Mills, Inc.*, 211 F. 2d 785 (10 Cir. 1954).

The Court of Appeals has failed to follow Massachusetts law governing indemnity agreements when it construes the indemnity agreement in issue to provide for indemnification even though the indemnitee was also negligent. "'Contracts of indemnity are to be fairly and reasonably construed in order to ascertain the intention of the parties and to effectuate the purpose sought to be accomplished.' *Century Indem. Co.* v. *Bloom*, 325 Mass. 52, 56, and cases cited. '[W]e must construe the contract with reference to the situation of the parties when they made it and to the objects sought to be accomplished.' *Bryne* v. *Gloucester*, 297 Mass. 156, 158." *New York, New Haven & Hartford Railroad Co.* v. *Walworth Co.*, Mass. Adv. Sh. (1959) 1421, 1422. The Massachusetts law has been set

forth in *Farrell* v. *Eastern Bridge & Structural Co.*, 291 Mass. 323, where, at page 324, Mr. Justice Lummus, interpreting an indemnity agreement, said: ". . . if the plaintiffs [indemnitors] were negligent, the defendant [indemnitee] must be either *in pari delicto* or not. If *in pari delicto*, a contract of indemnity such as this, in the absence of express language not found in [the indemnity agreement] making immaterial the negligence or fault of the indemnitee . . . , will not be construed as furnishing the indemnitee indemnity against the consequences of its own actual participation in the wrong"; and, in *Boston & Maine Railroad* v. *T. Stuart & Son Co.*, 236 Mass. 98, at pages 103-104, it was said: "The contract under consideration by its terms did not purport to obligate the defendant to indemnify the plaintiff from the consequences of contributory negligence on the part of its employees, as did the undertaking considered in *Woodbury* v. *Post*, 158 Mass. 140; hence that case does not aid the plaintiff. See also *Bay State Street Railway* v. *North Shore News Co.*, 224 Mass. 323, where the contract was to the same effect, as it expressly referred to injuries resulting from negligence of the plaintiff's employees. These cases, however, establish the proposition that such an agreement is not void as against public policy. A contract of the nature here involved will not be considered as indemnifying one against his own negligence, or that of his employees, unless its express language requires it. Such an intent must unequivocally appear, and words of general import are not sufficient. It is not to be assumed in the absence of clear stipulation that a contract is to be construed as creating a result so far reaching, and involving consequences which may be so hazardous and momentous."

This rule has been invariably followed in the Supreme Judicial Court of Massachusetts and has been extended only where the contract of indemnity would be meaningless

if it was not construed to include indemnification for the indemnitee's negligence or where the terms of the agreement were such that an intent to include indemnification for the indemnitee's negligence was necessarily intended.

Examples of the application of this rule are:

New York Central Railroad Co. v. *William Culkeen & Sons Co.*, 249 Mass. 71, where an indemnity agreement provided in one clause that indemnity was not provided if the loss was caused by the negligence of the indemnitee and in a later clause provided for indemnification without reference to the possible negligence of the indemnitee. At page 75: ". . . the express exemption in the preceding covenant of indemnity by the [indemnitor] in the same instrument against damages arising from the plaintiff's [indemnitee's] negligence has a strong tendency to show that in the following covenants indemnity against damages arising from negligence was included."

Clarke v. *Ames*, 267 Mass. 44, 46, where plaintiff sued defendant for injuries resulting from negligence of defendant's elevator operator. Plaintiff was lessee of defendant under a lease including a provision that the lessee would hold the lessor harmless from claims resulting from lessee's negligence "or by reason of any injury, loss or damage from any cause to any person or property upon or about the demised premises or while in transit thereto or therefrom upon the hallways, stairways, elevators or other approaches to the demised premises." The defendant pleaded the indemnity clause in bar to plaintiff's action and was sustained on a holding that the indemnity clause quoted was an express agreement whereby defendant contracted against liability for its own negligence.

New York, New Haven & Hartford Railroad Co. v. *Walworth Co.*, Mass. Adv. Sh. (1959) 1421, an action for indemnification based upon an agreement whereby defendant indemnified railroad against any damage "except such as

arise solely from the gross negligence of the Railroad Company or its agents and servants" (p. 1423). "We are aware that a contract will not be construed as indemnifying one against his own negligence or that of his employees unless express language unequivocally so requires. . . . This test is met by the language of the contract excluding liability for gross negligence of the railroad company, which is a simultaneous inclusion of liability for ordinary negligence" (pp. 1424-1425).

Laskowski v. *Manning*, 325 Mass. 393, wherein plaintiff was injured in a fall on ice on a sidewalk covered by a lease to defendant Manning from defendant bank in which it was covenanted that Manning would indemnify the bank against liability resulting from failure to remove snow and ice from the sidewalk bordering the premises. The jury found that the instrumentality which caused the ice to form was in the control of the lessor bank. The Supreme Judicial Court overruled the exceptions taken to the failure to give instructions which would have required the jury to find against Manning on the indemnity clause, saying, at page 399: "This is not a case where it is necessary, in order to give effect to the lessee's undertaking, to construe his promise as comprehending an indemnity against the lessor's negligent acts as to a part of the property in the lessor's control, and we do not accept that construction."

Old Colony Street Railway Co. v. *Brockton & Plymouth Street Railway Co.*, 218 Mass. 84, where the Court was faced with an action upon an indemnity agreement providing that damages sustained by the plaintiff in the course of operating defendant's cars on plaintiff's tracks should be borne by plaintiff if due to the negligence of plaintiff's servants and by defendant if due to defendant's negligence in maintaining or repairing its cars. The trial Court found that the accident which gave rise to the claim

against plaintiff for which it sought indemnity was due to the negligence of plaintiff's servants in operating the car at an excessive rate of speed and was equally caused by a break in an axle which was due to defendant's negligent maintenance. At page 88: ". . . the accident was due to the combined effect of the negligence of both parties, and cannot be attributed to the negligence of either one of them alone." And at the same page: "Under these circumstances, we think it plain that upon that part of the agreement which we have stated the action cannot be maintained. The case is not covered by that clause of the agreement, giving to it its broadest construction against the defendant; for at most it dealt only with accidents which were due to the fault of one party rather than of the other."

Applying the tests established by the Supreme Judicial Court to the indemnity agreement before the Court, there is no "express language" making the indemnitee's negligence immaterial; nor does such an intent "unequivocally appear"; nor is there a "clear stipulation" to that effect; nor is there an express exemption of the indemnitee's negligence in another part of the instrument; nor an exemption of gross negligence on the part of the indemnitee; nor is it "necessary . . . to give effect to the lessee's undertaking to construe . . ." the agreement as making the indemnitee's negligence immaterial.

The petitioner submits that the Court of Appeals, in the light of the above authority, could not rule that the contract of indemnity may be construed to include indemnification even where the indemnitee (here the railroad) was also negligent.

The Court of Appeals stated in its opinion (R. 108) that "Any other construction would set the agreement at nought." Petitioner submits that the construction which it argues would be applied to the indemnity agreement by

the Courts of Massachusetts would not set the agreement at naught for it is apparent that the agreement would be clearly applicable to a loss caused by the sole negligence of the petitioner. Further, the construction given to the indemnity agreement by the Court of Appeals violates the strict rule of construction for indemnity agreements laid down by the Supreme Judicial Court and quoted herein (at page 6) from *Farrell* v. *Eastern Bridge & Structural Co.*, 291 Mass. 323, 324, and from *Boston & Maine Railroad* v. *T. Stuart & Son Co.*, 236 Mass. 98, 103-104.

While no decision by Massachusetts or Federal Courts based upon Massachusetts law has been found which is precisely in point, petitioner contends that the following Second Circuit decision is almost identical with the case at bar: Plaintiff, a railroad employee, was injured when a bridge of snow, which had formed between the roof of a warehouse and the roof of a railroad car on a spur track (caused by the fact that the railroad had negligently placed the tracks too close to the warehouse), was disturbed by the movement of the railroad car and fell upon him. In the employee's action the railroad brought in the proprietor of the warehouse by third party complaint seeking indemnification under an agreement providing for indemnification but for a division of damages if the jury were caused by the joint or concurring negligence of the indemnitor and the indemnitee. The railroad established that an agent of the indemnitor had known of the existence of the snow bridge and had called for the movement of the car by the indemnitee without giving notice of the presence of the dangerous condition. The trial Court awarded the railroad only one-half of the damages as against the indemnitor. In reviewing this action the Court of Appeals said: "The Railroad also contends that in no event could the jury have found that its negligence was on the same level of culpability as [the indemnitor's], and consequently

it was entitled to full indemnity, citing cases where full indemnity was awarded to other carriers under similar agreements . . . In those cases the injury was produced by the primary negligence of the siding owner, and the carrier's only fault lay in the fact that it had a nondelegable duty to provide a safe place to work for its employees. Here the jury could have found that there was equal culpability—the Railroad having built tracks in an unsafe place and [the indemnitor] once aware of the peril, having failed to warn plaintiff of it." *Wanser* v. *Long Island Railroad Co.*, 238 F. 2d 467, 470-471.

Stauffer Chemical Company submits that the *Wanser* case is on all fours with the case at bar and should have been followed by the Court of Appeals. In that case the finding that the parties were *in pari delicto*, under the terms of the indemnity agreement, resulted in division of the damages, but in the case at bar, under the terms of the indemnity agreement as it must be interpreted under the controlling Massachusetts law, indemnification should have been denied.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL P. SEARS,
Counsel for Petitioner.

Boston, Massachusetts.

Appendix A.

OPINION OF COURT OF APPEALS FOR THE FIRST CIRCUIT IN BOSTON & MAINE RAILROAD, DEFENDANT, THIRD PARTY PLAINTIFF, APPELLANT, v. ARLENE M. HALL, PLAINTIFF, APPELLEE, AND STAUFFER CHEMICAL COMPANY, THIRD PARTY DEFENDANT, APPELLANT, v. BOSTON & MAINE RAILROAD ET AL., APPELLEES.

(Heard October 5, 1960; Decided November 21, 1960.)

Before Woodbury, Ch. J., and Hartigan and Aldrich, Cir. JJ.

ALDRICH, *Circuit Judge*. On the morning of October 29, 1958, the plaintiff's testate, Hall, was a fireman on duty in the cab of a train operated by the defendant, Boston & Maine Railroad. He was killed when the train collided with a truck at a private grade crossing on the main line in Woburn, Massachusetts. This crossing was for the sole use of the third-party defendant, Stauffer Chemical Company, whose factory was on the opposite side of the track from a highway. By written agreement between Stauffer and the railroad the crossing gates were to be kept lowered at all times except when temporarily raised by Stauffer's employees to permit passage of vehicles. On the day in question Stauffer's gatekeeper, Forbes, possibly misled by a late blowing of Stauffer's 8 o'clock whistle, opened the gates and admitted a truck just before the train was due.[1]

[1] Forbes testified that he opened the gates shortly after the whistle, which, according to him, made it no later than 8:02. The train was due at 8:06, and the engineer testified it was on schedule. In view of the fact that we find the railroad negligent in another particular it is not necessary to decide whether Forbes' recollection of how soon he acted after a whistle which "customarily" blew at a certain hour would warrant a jury in finding the train ahead of time, and hence possibly negligent. We will assume that it was on schedule. In the railroad's cross action against Stauffer, tried without jury, the court expressly so found.

The air was foggy, impairing visibility. There was no automatic signal notifying Forbes that the train was coming, and he had no warning other than the timetable which, because of his mistake as to the time, was ineffective. The train arrived before the truck had completed its crossing. The then unavoidable collision killed Hall.

A finding by the jury that Forbes was negligent was unquestionably warranted on this evidence. Hall's executrix, however, did not sue Stauffer, but sued the railroad under the Federal Employers' Liability Act, 45 U.S.C. 51. Her first contention is that Forbes, although not an employee of the railroad, was its agent under the doctrine of *Sinkler v. Missouri Pacific R.R.*, 1958, 356 U.S. 326, so that his negligence was to be attributed to the railroad. The court charged the jury that it might so find. We do not believe it necessary to decide this matter in view of the plaintiff's second contention. This was that the railroad was itself negligent in not providing for an automatic signal which would warn Stauffer's gatekeeper of the arrival of trains. It was stipulated that such a signal could have been provided, and, of course, it is common knowledge that such signals exist at grade crossings maintained for the use of the public. The purpose in each instance must be precisely the same to warn the gatekeeper of the approach of trains. While there may be a difference with respect to gates which are kept raised except when a train is to pass, and the reverse, nevertheless, the difference is one of degree. If it is desirable to advise the railroad's own employee at a public crossing, it seems difficult to say that in no case can there be need of advising a gatekeeper at a private crossing. It may be, as the railroad suggests, that some private crossings have no gates at all. However, each crossing must be regarded on its own special facts. This one was traversed by 30 to 100 trucks each day. The particular truck in question was 45 feet long, and grossed 30 tons.

Some ten of this type crossed daily. Thirty trains pass daily. Although the track was straight for some distance, in the event of fog, as in this case, a train could not be seen until it was near the crossing. Hence there would be no visual warning.[2] We cannot rule as a matter of law that reliance upon an unprompted gate tender was sufficient and that the jury's affirmative answer to a special question, whether "one of the causes of Hall's death [was] the negligent failure of the railroad to have electrical devices . . . at the Stauffer crossing," was unsupportable. *Cf. Tiller* v. *Atlantic Coast Line R.R.*, 1943, 318 U.S. 54. The railroad's motion for a directed verdict was properly denied.

We turn to the cross action of the railroad against Stauffer on its written contract of indemnity. This agreement stated in part, "[The] crossing shall [not] be used . . . when any train is known to be due. . . . [Stauffer] will indemnify . . . [the] railroad . . . against any and all loss [or] . . . damage . . . and against any and all claims or suits for . . . death, by [Stauffer] or by any person authorized hereunder to pass and repass thereby or in any way attributable to the failure of [Stauffer] to perform this agreement or to the negligence of any crossing-tender in charge of said crossing and in its employ . . . when such claims or suits arise out of or are in any way referable to the existence or use of said crossing." Referring to this portion of the contract the court said, "This is a specific

[2] The truck driver testified that visibility was only 20-25 feet. We would take judicial notice that this is incredible. However, the witness most favorable to the railroad said 900 feet. It was estimated that the truck was proceeding at 2 miles an hour. Since the truck was 45 feet long, and a train is about 8 feet wide, the truck would be in its part for about 18 seconds. The train was traveling 59 miles an hour. Consequently, the truck could readily have been struck by a train that was not visible when the truck entered the track area, for in 18 seconds the train would travel some 1500 feet.

agreement between Stauffer and the railroad that no matter how many blameworthy causes of Hall's death may exist, if one of the causes is the negligence of Stauffer's crossing-tender then Stauffer will indemnify the railroad. There could hardly be drawn an indemnification agreement more clearly applicable to the case at bar." As a result the court ordered judgment against Stauffer in favor of the railroad for the amount of the judgment entered in favor of the original plaintiff on the verdict. Stauffer appeals.

Stauffer contends at the outset that the indemnity agreement should be governed by the law of Massachusetts, and not by federal law. We will so assume as, if there is any difference, the Massachusetts law appears the more favorable to Stauffer. The Massachusetts court is one that denies contribution between joint tortfeasors. *Old Colony St. Ry.* v. *Brockton & Plymouth St. Ry.*, 1914, 218 Mass. 84, 88; *Burke* v. *Hodge*, 1912, 211 Mass. 156, 164. This principle appears to have colored its views with respect to indemnity agreements. See *Churchill* v. *Holt*, 1881, 131 Mass. 67. While such a provision is not against public policy, an agreement, as a matter of construction, will not be interpreted to provide for indemnification when the indemnitee's own negligence contributed to the loss "unless its express language requires it. Such an intent must unequivocally appear, and words of general import are not enough." *Boston & Maine RR.* v. *T. Stuart & Son Co.*, 1929, 236 Mass. 98, 104. See *Farrell* v. *Eastern Bridge & Structural Co.*, 1935, 291 Mass. 323.

We question whether this agreement unequivocally provided for indemnification no matter what negligence of the railroad contributed to the loss. We might doubt whether, for example, if the train had been ahead of schedule, and this had been found to be negligence contributing to Stauffer's improvident exercise of its easement, the agreement would have been operative. But that

is not the question. The only fault we have determined by the railroad was the failure to maintain a warning signal.[3] A contract must be construed in the light of the circumstances under which it was made. Stauffer knew that the railroad was delegating responsibility to it in the circumstance of there being no signal, and accepted liability for negligence of its gatekeeper under those conditions. It cannot now say that the agreement is inapplicable to this loss because there was no signal, whether, as regards third parties, such absence was a fault or not. Any other construction would set the agreement at nought. The Massachusetts rule as to the scope of indemnity agreements is one of construction, not of law. It does not, in our opinion, override the primary rule of interpretation: "Every instrument in writing is to be interpreted, with a view to the material circumstances of the parties at the time of the execution, in the light of the pertinent facts within their knowledge and in such manner as to give effect to the main end designed to be accomplished. . . . [The] instrument is to be so construed as to give effect to the intent

[3] As we have previously stated, it was contended that under *Sinkler* v. *Missouri Pacific R.R.*, 1958, 356 U.S. 326, Forbes was an "agent" of the railroad. Hence it has been suggested that the railroad, as principal, was jointly liable with Stauffer, and that the parties were joint tortfeasors *in pari delicto*. The use by a licensee of a private easement of crossing (the raising of gates otherwise closed and protecting the crossing seems merely an incident of such use) was not in furtherance of any railroad business, and appears far removed from the direct operational assistance the railroad received from the switcher in *Sinkler*. However, even if it be assumed that in some respect the railroad was responsible for Forbes, the Massachusetts court has not applied the doctrine of *in pari delicto* to all forms of dual liability. Cf. *Old Colony R.R.* v. *Slavens*, 1889, 148 Mass. 363; *Lowell* v. *Boston & Lowell R.R.*, 1838, 23 Pick. 24. See *Nickerson* v. *Wheeler*, 1875, 116 Mass. 295, 298. And in any event, we think the reasoning hereafter expressed in the body of the opinion would apply equally to this claimed "agency" ground.

of the . . . [parties] as manifested by the words used illumined by all the attendant factors, unless inconsistent with some positive rule of law or repugnant to other terms of the instrument. An omission to express an intention cannot be supplied by conjecture. But if the instrument as a whole produces a conviction that a particular result was fixedly desired although not expressed by formal words, that defect may be supplied by implication and the underlying intention . . . may be effectuated, provided it is sufficiently declared by the entire instrument." *Dittemore* v. *Dickey*, 1924, 249 Mass. 95, 104-105, quoted in *Spaulding* v. *Morse*, 1947, 322 Mass. 149, at 152-153.

Affirmed.

Appendix B.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, WYZANSKI, J., IN BOSTON & MAINE RAILROAD, THIRD PARTY PLAINTIFF, V. STAUFFER CHEMICAL COMPANY, THIRD PARTY DEFENDANT, DATED FEBRUARY 11, 1960.

WYZANSKI, D. J.

Hall was killed in a grade crossing collision on October 28, 1958. He being an employee of the B & M Railroad his executrix brought in this Court an FELA action against the railroad, and claimed a jury trial. The railroad then filed a third-party complaint against Consolidated Chemical Industries, Inc., for which Stauffer Chemical Company was later substituted as third-party defendant. In this third-party action, a jury was waived.

This Court finds that these are the governing facts with respect to the third-party action.

At the Stauffer plant in South Wilmington, or as it is more accurately called Woburn, there is a grade crossing. On one side of the crossing is a parking lot. Then there is a gate operated manually by a crank. Beyond the gate are three sets of rails—one for a siding, a second for South-bound traffic, and a third for North-bound traffic. On the other side of the North-bound traffic rail there is a divided gate, also manually operated. Beyond is the Stauffer plant.

The two gates are kept lowered all night. In the day Forbes is the gate keeper and crossing-tender. Forbes is the Stauffer plant manager and is not an employee of the railroad. The railroad gave orally its schedule to Forbes. From that schedule he knew that there was due from the South a North-bound train at 8:06 every morning. Customarily Forbes came to the plant about 8 A.M., raised the two gates, allowed some trucks to cross the tracks; and then lowered the gates so that the 8:06 could pass.

On October 28, 1958 Forbes arrived at the parking lot at 8 A.M. Despite his own estimate of time, but relying on the basis of the activities Forbes testified he had performed after 8 A.M., I find that it was about 8:05 before he had raised both gates on October 28. Forbes looked down the track in a Southerly direction. A morning fog made objects more than 400 feet away invisible. Forbes saw no train. He heard no train horn; but he was aware that about half the time trains did not sound a horn as they approached the crossing. Forbes waved to a tractor-trailer driven by Rollinson to cross the track. And Rollinson started to cross.

Meanwhile, the B & M Budd train left Boston at 7:50 A.M. Engineer O'Brien was in charge. Under his direction fireman Hall was driving the train. It passed Montvale, two miles from the Stauffer crossing, at 8:03 A.M. O'Brien told Hall to sound the horn. It is doubtful if Hall did so, since no one at the crossing testified he heard it. As the

train was about 400 feet from the crossing O'Brien saw that the Westerly gate was raised. Almost simultaneously O'Brien saw the truck. He shouted to Hall to leave the cab. Both men left for the car behind the engine. Then the train ploughed through the trailer part of the tractor-trailer. The collision caused the almost immediate death of Hall.

In her FELA complaint against the railroad, Mrs. Hall, the decedent's representative, alleged that Hall's death was "due to the defendant, its *agents*, servants, or employees" and to "defendant's negligence in providing an unsafe place to work for the plaintiff's decedent." In my charge to the jury I instructed them that they could find the railroad negligent if they found that Stauffer was performing for the railroad operational functions and that in performing them Stauffer's plant manager Forbes failed to exercise due care to Hall. [Cf. *Sinkler* v. *Mo. Pac. R.*, 356 U. S. 326]. Also I instructed the jury that they could find the railroad negligent if they found that a reasonable and prudent railroad would have had at the Stauffer crossing electrical equipment to give signals or to close the gates.

The FELA jury returned a general verdict for Mrs. Hall in the amount of $50,000. Responding to special questions which were covered by my charge and were considered by the jury simultaneously with their general verdict, the jury gave affirmative answers to each of the two following questions. "1. Was one of the causes of Hall's death the failure of plant manager Forbes to exercise due care toward fireman Hall? 2. Was one of the causes of Hall's death the negligent failure of the railroad to have electrical devices for sounding a bell or flashing a light or lowering gates at the Stauffer crossing?" Upon that verdict I am entering a judgment of $50,000 plus costs for Mrs. Hall against the railroad. I also specifically adopt the jury's verdict and answers.

The railroad now seeks to be indemnified by Stauffer in accordance with a contract of October 18, 1928 made by the railroad with a predecessor of Stauffer Chemical Company. The parties have agreed that Stauffer stands precisely in the shoes of its predecessor which made the contract with the railroad. Under that contract the railroad gave to Stauffer's predecessor a crossing easement available to Stauffer and those who came as invitees or licensees to Stauffer's premises. Stauffer agreed that the crossing shall "not" be used "when any train is known to be due," and Stauffer agreed in paragraph (d) that it would "indemnify" the railroad "against any and all loss [or] . . . damage, and against any and all claims or suits for . . . death, by [Stauffer] or by any person authorized hereunder to pass and repass thereby or in any way attributable to the failure of [Stauffer] . . . to perform this agreement or to the negligence of any crossing-tender in charge of said crossing and in its employ . . . when such claims or suits arise out of or are in any way referable to the existence or use of the crossing."

This contract was made in Massachusetts by parties having places of business in Massachusetts and with respect to possible claims most of which were likely to be made in Massachusetts. If the law of any state is to be applied, Massachusetts law would be the most appropriate state law. It could be argued that insofar as the contract applies to the right of the railroad to be indemnified by Stauffer for damages which the railroad is required by the FELA to pay railroad employees the contract is governed by federal law. But this argument goes beyond any decided case. And in the absence of any indication that the federal law would differ from the law of Massachusetts the point need not now be resolved.

Whether Massachusetts law or federal law be applied, it is indisputable that in this 1923 contract Stauffer is

bound to "indemnify" the railroad "against . . . all damage . . . or . . . claims or suits for . . . death . . . in any way attributable to the failure of [Stauffer] . . . to perform this agreement or to the negligence of any crossing-tender in charge of said crossing and in its [Stauffer's] employ . . . when such claims or suits arise out of or are in any way referable to the existence or use of said crossing."

This is a specific agreement between Stauffer and the railroad that no matter how many blameworthy causes of Hall's death may exist, if one of the causes is the negligence of Stauffer's crossing-tender then Stauffer will indemnify the railroad. There could hardly be drawn an indemnification agreement more clearly applicable to the case at bar. I need not review in detail the various distinguishable cases discussed in the arguments before me. Those were cases where either the indemnification language was vague, or all the negligent persons were employees of the indemnitee, or the damage was the consequence of the negligence of the indemnitor followed by (or less important than) the negligence of the indemnitee. Here Stauffer's own employee, Forbes, took affirmative action which involved a lack of due care to plaintiff's decedent. That was the last event in the chain of causation. Most important, Stauffer had expressly agreed to indemnify the railroad with respect to any claim, (not only a claim of a person passing over the crossing as a Stauffer invitee or licensee,) which was *in any way* attributable to the negligence of Stauffer's crossing-tender. And there is no public policy against the enforcement of such an express agreement. Nor can there be any doubt that as between the grantee, Stauffer, and the Boston & Maine railroad, Forbes, the crossing-tender, was Stauffer employee, selected by it, and under its direction and control. Hence it is of no avail to the grantee that as between the FELA plaintiff, Mrs. Hall, and the B & M Railroad, Forbes was

also an "agent" of the railroad under the doctrine of the *Sinkler* case governing FELA actions.

Judgment for plaintiff.

United States District Judge

Appendix C.

JUDGMENT ENTERED FEBRUARY 11, 1960, BY WYZANSKI, J., IN ARLENE M. HALL, EXECUTRIX, V. BOSTON & MAINE RAILROAD AND BOSTON & MAINE RAILROAD, THIRD PARTY PLAINTIFF, V. STAUFFER CHEMICAL COMPANY, THIRD PARTY DEFENDANT.

WYZANSKI, *D. J.*

This case having come on for trial before the Court and jury, and a jury claim having been made with respect to the action of Arlene M. Hall, Executrix, against Boston & Maine Railroad, and a jury having been waived in the third party action of Boston & Maine Railroad against Stauffer Chemical Company, and the two aspects of the case having been consolidated for trial, and the evidence having been offered by the parties, and the arguments having been had, and the jury having returned on February 10, 1960 both a general verdict and answers to special questions, and the Court having filed together with this judgment its findings of fact, conclusions of law, and opinion, now therefore it is

ORDERED, ADJUDGED AND DECREED

1. In accordance with the verdict of the jury, Arlene M. Hall, Executrix, shall recover from Boston & Maine Railroad $50,000 and her costs taxed at $

2. In accordance with the Court's findings of fact, conclusions of law, and opinion, Boston & Maine Railroad

shall recover from Stauffer Chemical Company such part and only such part of the sum of $50,000 and costs referred to in Paragraph 1 as Boston & Maine Railroad shall show by competent evidence that it has paid or may hereafter pay on account of the recovery of plaintiff Arlene M. Hall, Executrix.

By the Court
Deputy Clerk

United States District Judge